STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT

In re the Guardianship of Jeffers J. Tschumy, Ward	**ORDER** Court File Number: 27-GC-PR-07-496 Judge Jay M. Quam

The above-captioned proceeding came on for a hearing on May 3, 2012. Rebecca Moos, Esq., appeared on behalf of Allina Health System. Charles Singer, Esq., appeared on behalf of Guardian Joseph Vogel. Michael Bigelow, Esq., appeared by special court appointment on behalf of Jeffers J. Tschumy.

INTRODUCTION

This case presents a question of fundamental importance: Who has the power to decide if a person under guardianship should be allowed to die? Should it be the guardian, who has been given significant power over the life of the person under guardianship, and who presumably is intimately familiar with that person's circumstances and desires? Should it be the Court, since the Court has the ultimate responsibility to safeguard the welfare of that person? Is there an alternative that avoids in many cases the unwanted and unnecessary intrusion by the courts into highly emotional matters of life and death?

With about 12,000 people currently under guardianship in Minnesota, this is an issue of practical importance. Some people under guardianship will come into unfortunate circumstances where it may be appropriate to allow them to die. Indeed, as far back as 1984, the Minnesota Supreme Court noted that an average of ten life support systems in Minnesota are disconnected every week. Some of those unfortunate individuals are undoubtedly under guardianship. This Order addresses the question of who may make the decision to disconnect from life support a person under a guardianship.

PROCEDURAL AND FACTUAL HISTORY

A petition for guardianship for Jeffers J. Tschumy, the individual at the core of this case, was initially granted on April 18, 2008. It was granted because Mr. Tschumy was incapacitated due to cognitive difficulties. Those cognitive difficulties prevented Mr. Tschumy from properly obtaining health care, housing, food and transportation. Connie Hanson was appointed as Mr. Tschumy's guardian to help him meet these challenges. On March 30, 2009, a petition was filed to appoint a successor guardian. This petition was granted on October 6, 2009, and Joseph Vogel was appointed as successor guardian for Mr. Tschumy.

Mr. Tschumy was living a comfortable life in his group home until April 15, 2012. On that date, he choked on some food and lost consciousness. Mr. Tschumy was revived, but a CT scan showed that Mr. Tschumy had suffered anoxic brain

injury. Mr. Tschumy was diagnosed with irreversible anoxic encephalopathy, continuous seizure, and respiratory failure. The hospital's Ethics Committee reviewed Mr. Tschumy's condition and concluded that there was no realistic hope of recovery.

As a result of Mr. Tschumy's tragic medical condition, Allina Health System brought the matter to court. It did so by making a Motion to Amend Successor Letters of General Guardianship. Though the title of the motion sounds administrative, it involves a matter of life or death: Essentially, the hospital sought authority to allow Mr. Tschumy to die by removing him from life support. The hospital sought to hasten Mr. Tschumy's end by asking the Court to either (1) clarify that Guardian Joseph Vogel has the specific authority within the medical powers given to him as guardian to direct that decision *without* Court consent or review; or (2) specifically authorize the removal of Mr. Tschumy's life support.

An initial hearing on Allina's petition was held on April 24, 2012. At that hearing the guardian's attorney argued that the power inherent in the existing Letters of General Guardianship gave Mr. Vogel the power to direct that Mr. Tschumy's life support be removed. Because there was no attorney specifically advocating for Mr. Tschumy, the Court deferred consideration of Allina's petition until an attorney could be appointed to represent Mr. Tschumy's interests. The Court accordingly appointed Michael Bigelow, Esq. to represent Mr. Tschumy.

Mr. Bigelow conducted an extensive investigation immediately following the appointment and submitted a very thorough report to the Court.

On May 3, 2012, the Court conducted an evidentiary hearing where it considered evidence about Mr. Tschumy's life and circumstances, and where it considered Mr. Bigelow's report. As is discussed in greater detail in the Court's May 9, 2012 Order, the evidence conclusively established that Mr. Tschumy had suffered irreversible and overwhelming damage to his brain, and that he would not want to have his life artificially prolonged. Mr. Biglow's investigation yielded nothing that suggested to him that Mr. Tschumy had any realistic hope of recovery or that Mr. Tschumy would have wanted to live in that severely compromised medical condition. Accordingly, Mr. Bigelow concurred in the judgment that Mr. Tschumy should be removed from life support.

Because Mr. Tschumy was suffering from a possibly painful, and certainly irreversible condition, the Court issued a written order authorizing the removal of life support. At that time the Court verbally denied the guardian's request to declare that the guardian had the right to terminate life support without prior approval by the Court. The life support was removed, and Mr. Tschumy died shortly thereafter.

Though Mr. Tschumy is dead, the Court owes an explanation to the parties for its oral ruling that under existing law a guardian *does not* have the authority

within the guardian's medical power to decide whether to remove life support from the ward. Moreover, the question about what should happen in the next case remains; since it is the Court's duty to provide guidance to guardians under its jurisdiction, this Order serves to inform guardians of their responsibilities if their wards are facing circumstances which call for end-of-life decision making.

THE MEDICAL POWER GRANTED A GUARDIAN DOES NOT GIVE THE GUARDIAN THE UNRESTRICTED AUTHORITY TO DIRECT THE REMOVAL OF LIFE SUPPORT.

As a preliminary matter, the issue of whether a guardian has authority to direct the removal of life support from a person under guardianship has never been addressed by the Minnesota courts. In the State's seminal case on terminating life support, *In re the Conservatorship of Torres*, 357 N.W.2d 332 (Minn.1984), the Minnesota Supreme Court decided the fundamental question of whether it is ever appropriate to authorize the termination of life support. Though the *Torres* court concluded that the probate court could authorize the termination of life support, it never reached the question of whether a guardian could independently do so as well.

Because neither the *Torres* court nor the Legislature have addressed whether a guardian has the power to authorize the removal of life support, this Court is left to pick up where the *Torres* court left off. As reflected below, this is not a one-sided argument, and this is not written as a one-sided decision. Accordingly, to

give the proper context for the Court's decision making and to give Petitioner his due, the Court will discuss both sides of the argument.

I. THERE IS A STRONG CASE FOR CONCLUDING GUARDIANS HAVE THE INHERENT POWER TO MAKE END-OF-LIFE DECISIONS.

As mentioned above, there are strong arguments for both sides of this issue. To be true to the difficult nature of this issue, the Court starts with a discussion of the arguments which favor the power of a guardian to make that decision to end the life of one under guardianship.

A. Basic principles of statutory interpretation can be applied to support the unilateral authority of a guardian to make end-of-life decisions.

One of Petitioner's strongest arguments is in the language—and absence of language—in Minnesota Statute § 524.5-313. Section 524.5-313 identifies the powers that can be given to a guardian over one under a guardianship (called a ward). Generally, a guardian can be given extensive authority over virtually all aspect of a ward's life, including:

(a) Having custody of the ward and the power to establish a place of abode within or without the State. Minn. Stat. §524.5-313 (c)(1);

(b) Providing for the ward's care, comfort and maintenance, including food, clothing, shelter, health care, social and recreational requirements, and, whenever appropriate, training, education and rehabilitation. Minn. Stat. §524.5-313 (c)(2);

(c) Taking reasonable care of the ward's clothing, furniture, vehicles, and other personal effects. Minn. Stat. §524.5-313 (c)(3);

(d) Giving any necessary consent to enable, or to withhold consent for, the ward to receive necessary medical or other professional care, counsel, treatment or service. Minn. Stat. §524.5-313 (c)(4); and

(e) Approving or withholding approval of any contract, except for necessities, which the ward may make or wish to make. Minn. Stat. § 524.5-313 (c)(5).

This language, on its face, obviously gives to a guardian a great deal of power over the ward.

Petitioner effectively points to the broad language in the medical power and argues that the power to *give* consent to necessary medical treatment implies as well as the power to *withhold* that consent. This is an argument that the Minnesota Supreme Court in *Torres* seems to have accepted. As the Minnesota Supreme Court stated:

> Accepting the argument that "a conservator must have the power to refuse treatment on behalf of the conservatee, if the conservator's 'consent' is to have meaning... a conservator's order to remove a conservatee's life supports may be equated with a refusal to consent to further medical treatment."[1]

Id. at 339.

[1] When *Torres* was decided there was different terminology. Today, the proper title for one making decisions over a person's life is called a guardian; back then, the term used was a conservator over the person. Likewise, the person now known as the ward was known as the conservatee.

Suffice it to say, much is included in a grant of power to either grant or withhold any necessary medical or other professional care, counsel, treatment, or service.

Petitioner's argument gets even stronger when one considers the fact that the Legislature identified specific procedures to which a guardian *cannot* consent. The statute reads:

> [N]o guardian may give consent for psychosurgery, electroshock, sterilization, or experimental treatment of any kind unless the procedure is first approved by order of the court as provided in this clause.

Minn. Stat. § 524.5-313(4)(i). Conspicuously *absent* from the list of medical interventions that need prior court approval is the power at issue in this case: terminating life support. Because the *Torres* decision has been on the books for nearly thirty years, the question of removing life support is obviously not new, and it has been known to the Legislature. By deciding not to include the termination of life support in the medical interventions that require prior court approval, there is a reasonable argument that the Legislature deliberately chose to give that authority to the guardian.

B. In many cases, professional guardians and/or family members can make the best decisions.

Further, there is no question that most end-of-life decisions are best made by collaboration between the guardian, family members, and medical professionals. In

this collaborative and cooperative process, each participant brings to the decision making a unique and valuable perspective. The family members bring knowledge of the ward's background, values, and desires; the medical professionals bring a realistic assessment of the ward's medical condition; and the guardian brings the perspective of a responsible decision-maker.

This process, at least in theory, can work especially well when there is a professional guardian in place. There is no doubt that many professional guardians undergo substantial training about the procedures involved when considering an end-of-life decision. Moreover, in many hospital settings the treatment team accepts the decision of the guardian and acts upon it. Certainly in the case of the professional guardian, the guardian's experience with, and training in, these issues makes the guardian uniquely qualified to make the best decision.

C. Many favor the clinical approach over judicial intervention.

This is not the first time there has been debate over who should hold the power of life and death in end-of-life decision making. This ongoing debate presents two decision making approaches for incompetent patients: The "clinical approach" and the "judicial approach." Stephen C. Kenney, *Death and Life Decisions: Who is in Control?* 23 Loy. L. Rev. 791 at 818.

The clinical approach is one where important personal decisions are made outside of the court process. Kenney claims that the clinical approach is

"increasingly favored by the courts because the overall result of judicial involvement has tended to be cumbersome and expensive." *Id.* at 819. Indeed, many jurisdictions have indicated in decisions over the past two decades that, in the case of family members and physicians agreeing on termination, the court need not be involved. *Id.* at 820.

The judicial approach, on the other hand, is more expensive, time-consuming, and cumbersome. It requires court action, evaluation and assessment by a judge, the assignment of a guardian, and court hearing(s). The legal process is not only cumbersome and expensive, but also emotionally burdensome to the family of the suffering ward. Further, in some cases (as here), judicial involvement may prolong the otherwise unnecessary suffering of the ward. *Id.* at 819.

II. BECAUSE OF THE SIGNIFICANCE AND FINALITY OF END-OF-LIFE DECISION MAKING, GUARDIANS DO NOT HAVE THE INHERENT POWER TO MAKE END-OF-LIFE DECISIONS.

This Court is sympathetic to all the reasons why the "clinical approach" could be, in theory, the preferred way to handle end-of-life decisions. Indeed, this is not the type of case judges hope to find on their daily case assignment sheets. There is nothing attractive to the court when it must:

- clear its calendar to hear an end-of-life case on an expedited basis;

- intrude into the highly personal decision making that is involved in end-of-life matters;
- subject emotionally distraught friends and family members to a relatively long and painful court process; or
- prolong the time that a person suffers from a terminal condition.

Despite the strength of the arguments for the "clinical" approach, however, the Court believes that stronger arguments favor the opposite view. That view is under *Torres* and the current statutory scheme, courts must make end-of-life decisions when a guardian has been appointed.

A. *Torres* highlights the unparalleled significance of end-of-life decisions and reserves end-of-life decision making for the court.

No one can read *Torres* without appreciating the magnitude of end-of-life decisions. As the Minnesota Supreme Court in *Torres* recognizes, end-of-life decisions present "a number of issues of great societal concern." 357 N.W.2d at 341.

Indeed, end-of-life decisions can present a direct conflict between legitimate, but diametrically opposite, beliefs. On the one hand, some believe in sanctity of life, no matter what its condition. This is a belief that should command universal respect, even if not universal agreement. On the other hand, some legitimately believe that certain medical conditions are a fate worse than death. Both beliefs are respectable, with each person deserving the right to choose for him or herself.

1. The *Torres* Court relied on a "catch-all" provision for authority to determine life support rather than the medical power.

In discussing end-of-life decisions making, the Minnesota Supreme Court in *Torres* analyzed the then existing version of Minnesota Statute § 524.5-313. That statute -- Minnesota Statute § 525.56, subd. 3 (1982) -- enumerated the same powers that could be given to a guardian as the courts can give guardians today. One of those powers was (and is) the medical power. It is that medical power that the guardian in this case says provides his authority to make the decision to end Mr. Tschumy's life.

The Minnesota Supreme Court in *Torres* concluded that the trial court could empower a guardian to terminate the ward's life support. It did *not*, however, find the power to end a life derived from the medical power relied on by the guardian, or any of the statutorily enumerated ones. Instead, the Court determined that the "end-of-life" power derived from a "catch all" provision. That "catch-all" provision states that:

> The duties or powers... which the court may grant to a [guardian] *include but are not limited to* those specifically described.

Id. at 338 (emphasis in original).

The Court went on to emphasize that the power to terminate life support *could* be granted to a conservator of the person under this "catch-all" provision. As the Supreme Court stated:

> Thus, we believe that if the conservatee's best interest are no longer served by the maintenance of life support, the probate court may empower the conservator to order their removal despite the absence of a specific provision in Minn. Stat. § 525.56 (1982) which authorized the court to do so. These same powers may be granted to a conservator by the court. *Id.*, subd. 3 (1982)

Id. (emphasis added.)

Had the Minnesota Supreme Court believed that the power to end a life derived from the already-enumerated medical power, it would have said so. There would be no need to rely on the "catch-all" provision. Yet the Minnesota Supreme Court relied exclusively on that provision. That reliance on the power within the "catch-all" provision means everything as far as this Court's interpretation of the statute is concerned.

In light of *Torres*, the Court is not swayed by the argument that the Legislature identified what procedures needed prior court approval and did not include the power to terminate life support on that list. The reason is that the Legislature does not deal subtly with matters of life and death. Nor should it. Simply stated, if the Legislature intended to give a guardian the power to end the ward's life, it would have explicitly done so. The Court does not believe that the

Legislature intended a subtle inference in a statute to bestow on 12,000 guardians around the state the most awesome power imaginable over the life of another.

2. The Trial Court did not grant Mr. Tschumy's guardian any "catch-all" powers.

A guardian can only exercise the powers granted by the Court, and the court should grant only those powers that are currently needed to provide for the ward. Minn. Stat. § 524.5-313(b) ("The Court shall grant to a guardian only those powers necessary to provide for the demonstrated needs of the ward."). Accordingly, at the outset of most guardianship cases, the Court only grants some, or all, of the enumerated powers. It does not grant any "catch-all" power. The only exception is when the very question is whether to terminate life support.

As discussed above, the Minnesota Supreme Court in *Torres* concluded that the power to end a life was *not* included in any of these enumerated powers typically granted to guardian, but instead was derived from the "catch-all" powers. Since it was not an issue that needed to be addressed upon the commencement of the guardianship, the Court could not, and did not, grant to the guardian of any "catch-all" powers.

Until this proceeding, there was also no granting of the specific power to end Mr. Tschumy's life. Under the statutes as interpreted by *Torres*, without the specific grant of power to end Mr. Tschumy's life, the guardian was statutorily

powerless to act to end it. The guardian simply had not been granted that authority until coming into court for that specific authority.

B. Termination of life-support is not a power that reasonably can be considered or conveyed at the time of guardian appointment.

As discussed above, under *Torres,* the Court clearly has the ability to give to a guardian the authority to end the life of a ward under proper circumstances. But what is also clear from *Torres* is that it is a power that must be *given;* it is not inherent in any of the enumerated powers normally granted to a guardian.

Even if the power to end a life could be given at the appointment of a typical guardian, it would not be practical to do so. Most guardianship proceedings are commenced at a time when the ward needs assistance with aspects of daily living, and not at a time when end-of-life decisions are contemplated. Any end-of-life decisions are typically years, even decades, away from the commencement of the guardianship.

As a result of this unforeseeable time gap between the commencement of a guardianship and the possible need for that guardian to make an end-of-life decision on behalf of the ward at some point in the future, judicial officers granting the guardianship cannot practically evaluate potential guardians for the ability to make an end-of-life decision. Nor could they without knowing the circumstances giving rise to the need to considering terminating a life.

How could a judicial officer know that a guardian will make a responsible decision if and when that time comes? What questions would a judge ask to define a guardian's willingness and ability to make decisions about possibly ending a life of a loved one years later under unknown circumstances? No one -- not even a judge -- can look into the future and into the hearts and minds of a guardian to know with confidence that he or she will decide appropriately when, and if, an end-of-life decision needs to be made.

C. Most guardians receive no training for end-of-life issues.

Finally, even though many professional guardians receive training regarding end-of-life issues, many guardians do not receive such training. In fact, family members or friends often act as guardians, and they rarely (if ever) receive training on end-of-life issues. Further, there are no safeguards in place to assure a minimum competency or an adequate set of skills for making quality end-of-life determinations.

Though most guardians are capable, dedicated, and sincere, a small minority do not satisfy some of the basic responsibilities of a guardian. If a guardian cannot fulfill a basic responsibility of the role (such as filling out annual reports), we all should be concerned when that guardian is tasked with something as serious as possibly ending a life.

Although irresponsible guardians are a very small minority, the mere existence of an irresponsible minority makes the Court leery of giving all guardians the power to end the life of their ward. The improper termination of a single life, even if it is a life artificially sustained by life-support systems, is one too many.

The lack of training and consistency among most guardians is precisely the reason to involve the judicial system – to provide experienced and impartial examination and evaluation of termination decisions. This judicial process can assure due process rights for the ward, and can sensitively address the concerns of the family and the health care providers.[2]

[2] Many of the concerns about end-of-life decisions can be alleviated through the execution of a valid health care directive. Nothing in this Order is intended to affect the consideration and application of a valid health care directive when a guardian and a health care provider are addressing end-of-life issues. There is typically no need for court intervention in end-of-life decision making in a situation where there is a valid health care directive.

CONCLUSION

Minn. Stat. § 524.5-313 grants broad power to guardians to consent to necessary medical treatment on behalf of their wards, but it does not specifically convey the power to terminate life support. Hopefully, the Legislature or higher judicial authority will definitively determine who can make end-of-life decisions, and how those decisions must be made. Until that time, this Court concludes that guardians under the Court's jurisdiction must ask the court for authorization to terminate life support when there is not a valid health care directive addressing end-of-life circumstances.

Dated: October 18, 2012

Jay M. Quam
Presiding Judge
Probate/Mental Health Division